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No. 89-55

In The

Supreme Court of the United States

October Term, 1989

CAROL L. PETTYJOHN,

Petitioner,

vs.

KALAMAZOO CENTER CORPORATION
d/b/a/ KALAMAZOO HILTON INN,
a Michigan Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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AUTHORIZATION FOR PETITIONER'S REPLY BRIEF

The rules of the Supreme Court of the United States, adopted June 15, 1970, effective July 1, 1970, and as amended to March 1, 1975 and thereafter, provide pursuant to Rule 24(3) & (4) that the petition and brief shall be distributed by the Clerk of the Court for consideration and a reply brief addressed to arguments first raised in the brief in opposition may be filed, but there will be no delay in distribution pending the filing of such brief.

SUMMARY OF PETITIONER'S REPLY TO ARGUMENTS RAISED IN RESPONDENT'S OPPOSING BRIEF

The essence of the Petition for Writ of Certiorari is issues of choice of law in the federal courts, the authority of the United States Congress to establish rules of evidence for the federal courts, and the right of trial courts in diversity cases to make discretionary determinations on the relevancy and admissibility of evidence called for by those rules. The holding of the Sixth Circuit Court of Appeals is that the U.S. District Court for the Western District of Michigan incorrectly applied *Freed v. Simon*, 370 Mich 473; 122 NW2d 813 (1963), and thereby admitted evidence of Dr. Feuer's prior accident. This evidence was determined by the Sixth Circuit Court of Appeals to be clearly inadmissible under *Freed*. The trial court, a federal district court in a diversity action, determined that this evidence was relevant and admissible for the limited purpose of showing notice of the unsafe or dangerous condition.

The specific question presented is:

> "Whether federal courts in diversity of citizenship cases are to use state substantive law rather than the Federal Rules of Evidence to make determinations on the relevancy and admissibility of evidence."

What is the Respondent's answer to the question presented for review? It is neither clear nor is it discernible! It appears to be an avoidance of a direct answer or statement of position as to the question asked.

The Respondent makes broad reference to the impact that state substantive law may have on evidence and that federal courts consider state precedents on issues related to the admissibility of evidence. However, directing attention to these general concepts does not reply to the question presented. The Petitioner asserts that the Court of Appeals erred by reversing the trial court on a question of relevancy and admissibility of evidence. The error was its interpretation of a state court evidentiary holding on a federal evidentiary issue. The trial court ruling was correct, based on the Federal Rules of Evidence and federal case law pertinent to issues of relevancy and admissibility.

Does the Respondent contend that state substantive law is to be used to decide the relevancy and admissibility of evidence in federal court diversity of citizenship cases? Does it contend that the relevancy and admissibility of the testimony is other than a federal court evidentiary question? Does it contend that the Court of Appeals decided the relevancy and admissibility issue under federal law, even though it stated that the trial court incorrectly applied the state court holding? Does it contend that the Court of Appeals used a federal law basis for the opinion it rendered?

These four (4) subsidiary questions fairly comprise the areas for challenge to the Petitioner's position. None of them make up the Respondent's opposition. These are neither answered nor addressed. That which is presented amounts to obtuse discourse and fails to deal with the essence of the important issue involved.

If the Court of Appeals did not base its decision on state law, then this petition should be dismissed as unfounded. However, its opinion specifically states that the District Court erred in admitting testimony, by incorrectly applying state law. No other basis is given for the holding! If Respondent actually agrees that the Federal Rules of Evidence, not state law, control determinations about relevancy and admissibility, then the Petitioner should be granted the relief requested.

This controversy focuses on the law to be used for deciding evidentiary questions in a diversity case. The Respondent asserts that state law might have an impact or be of persuasive value when a federal trial court is asked to determine the relevancy and decide the admissibility of evidence. Such argument is indicative of an effort to sidestep the questions presented. If the intent were otherwise, the Respondent would have clearly declared its position on applicability of the Federal Rules of Evidence or state substantive law. Instead, it equivocates, contending that the Court of Appeals merely considered rather than decided the issues of relevancy and admissibility based on state law.

The obfuscation and inability of the Respondent to pick a position tends to highlight a lack of clear understanding of the question presented. It is one of great significance and importance to general federal jurisprudence. The United States Supreme Court should take jurisdiction over this case and enter an order granting the Writ of Certiorari to review the decision of the Sixth Circuit Court of Appeals.

ARGUMENT

I

THE SIXTH CIRCUIT COURT OF APPEALS ERRONEOUSLY USED STATE LAW RATHER THAN THE FEDERAL RULES OF EVIDENCE WHEN DETERMINING THAT THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN DECIDING THAT THE EVIDENCE OF THE PRIOR ACCIDENT WAS RELEVANT AND ADMISSIBLE TO SHOW NOTICE OF AN UNSAFE OR DANGEROUS CONDITION.

The opinion of the Court of Appeals unequivocally provides that it found reversible error because "the District Court incorrectly applied *Freed v. Simon*, 370 Mich 473; 122 NW2d 813 (1963)." It further opined, "Oempke's testimony concerning the first accident of Dr. Feuer was clearly *inadmissible* under FREED to show either notice of a dangerous condition or negligence." Slip Op, p.3. (Petition, Appendix A.) It is irrefutable, despite protestations to the contrary, that the Court of Appeals decided this relevancy and admissibility issue in accordance with its interpretation of state law on relevancy and admissibility.[1]

What were the facts and issues before the District Court for decision on the basis of relevancy and admissibility? How did the District Court evaluate the facts and circumstances and decide the issues presented? On what

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[1] Even its interpretation of how the issue would be decided under state law was incorrect. Besides the case in question not standing for the proposition for which it was cited, it is also not the applicable law on point. The Michigan Rules of Evidence (MRE) enacted in 1978, well after the holding in the case relied upon, parallels the Federal Rules of Evidence (FRE) and operates on the presumption favoring the admissibility of evidence. MRE Rule 401-403.

basis did the District Court reach its ruling on the relevancy and admissibility of evidence? This important trilogy of questions, when looked at and answered, show the correctness of the trial court's thinking and its decision on the relevancy and admissibility question it faced.

The excerpt from the trial court record selected by the Court of Appeals for its opinion warrants careful review and consideration to recognize the significant aspects of the trial court ruling. Slip Op, p. 3, supra. One thing the trial court *did not* say was that the two (2) accidents were dissimilar.[2] Instead, it determined that the conditions giving rise to the two (2) accidents were not the same, because of identifiable dissimilarities[3] of the conditions giving rise to each of the accidents. The trial court discerningly considered the respective conditions, determined them to be similar but "not sufficiently similar that the testimony should be used as evidence of negligence ***". [TR Vol. II, p. 509] Then, using its authority and discretion to control the evidence submitted in a case, the trial court ruled that although not sufficiently similar to be permitted as evidence of negligence, it was relevant to show notice of the unsafe or dangerous condition. That was the limited purpose for which the trial court allowed it to be used. [TR Vol. II, p. 526]

The trial court addressed numerous challenges, at different stages of the trial proceedings, to the admissibility of this evidence. In addressing the preliminary question of admissibility, the trial court found that the foundational facts were sufficient to show it to be relevant or legally helpful to the jury in making a factual determination on liability. However, the trial court urged the Defendant to bring forth any evidence that it had to

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[2] Dissimilar: an adjective meaning different, *Webster's II New Riverside University Dictionary*, Riverside Publishing Co., Houghton Mifflin Co., Boston, MA (1984), p. 389.

[3] Dissimilarities: a plural of the noun meaning points of difference. *Webster's II New Riverside University Dictionary*, id.

challenge the Plaintiff's offer of proof, if it believed those representations to be inaccurate. [TR Vol. I, p. 77]

After all of the evidence was presented, the trial court made a final determination on this relevancy and admissibility of evidence question. It found that the evidence had a logical basis for showing that the Defendant was on notice about the unsafe or dangerous condition at its premises. It allowed the use of the testimony for that limited purpose. [TR Vol. II, p. 526] This affirmative determination, as to the relevancy of the evidence, was the condition precedent to its admission in accordance with FRE 401. In making its final decision, the trial court carefully took into consideration the extent to which the two (2) accidents were similar. Then, in the employment of its discretion, it did not permit the evidence to be used to show negligence. It permitted it to be used only for the purpose of showing notice of the unsafe or dangerous condition.

This ruling is consistent with the well-recognized, broad-scoped authority of a trial court to control evidence presented at trial. In *Gumbs v. International Harvester, Inc.*, 718 F2d 88, 97-98 (C.A. 3, 1982), this proposition was set forth as follows:

> "The Trial Judge has wide discretion to admit or exclude evidence under Federal Rules of Evidence. J.H. Wigmore, 2 Evidence Sec. 444 (Chadbourn, Rev. 1979); McCormick Evidence Sec. 200 (2 ND 1972). However, for the evidence to be relevant, there must be some logical relationship with the proffered evidence and the theory of the case. The plaintiff has the burden of establishing sufficient similarity between the accident and his own theory of how the accident occurred, so admission of the evidence of other accidents will make the existence of any fact of consequences to the determination more probable than it would be without the evidence. Federal Rules of Evidence 401."

It is generally well-settled in the federal courts, and has been held by the Sixth Circuit Court of Appeals, that testimony of other accidents in the same place are admissible to show notice of the dangerous character of the place or as evidence of defendant's negligence. *Staler v. Penn Central Transp. Co.*, 583 F2d 896, 898 (C.A. 6, 1978); 21 ALR4th 472, 479; n10. This Circuit has held that evidence of other accidents can be admitted to show design defects. *Rimer v. Rockwell International*, 641 F2d 450, 456 (C.A. 6, 1981).

The Sixth Circuit Court of Appeals has held that evidence of similar accidents, and even the lack of prior claims, is relevant as to the issue of actual or constructive knowledge of dangerous propensities. *Kolanda v. General Motors Parts Div., General Motors Corp.*, 716 F2d 373, 377 (C.A. 6, 1983). This is the trend of decisions in a majority of jurisdictions. They generally favor the admissibility of evidence of other accidents. *McCormick, Evidence Ed.*, Sec. 200 (E. Clary Ed., 1972); 29 AmJur2d *Evidence*, Sec. 310.

A trial court is invested with broad discretion in deciding evidentiary questions. It is to draw on its own experiences, in the affairs of mankind, when evaluating the probabilities upon which relevancy depends. *U.S. v. Williams*, 545 F2d 47, 50 (C.A. 8, 1976). The Sixth Circuit Court of Appeals ignored the admonition that, absent the showing of a clear abuse of discretion, trial court rulings on relevancy and materiality are not to be disturbed. *U.S. v. Ashley*, 555 F2d 462, 465 (C.A. 5, 1977), *cert denied* 434 U.S. 869; 98 S. Ct. 210; 54 L. Ed. 2d 147.

The Court of Appeals did not indicate any failure by the trial court to make the discretionary decision required of it. It did not find an incorrect application of the Federal Rules of Evidence! However, there was an apparent dislike for the choice made by the trial court for that discretionary decision.

The appellate decision in this case, by placing reliance on its interpretation of state law, eludes direct conflict with the Federal Rules of Evidence on relevancy

and admissibility. However, the objective sought to be accomplished was achieved through application of wrong legal standards. It has resulted in an erroneous legal precedent. It will only cause substantial confusion for trial attorneys and judges, and will lead to the development of erroneous interpretations about the law to be applied for rulings on evidentiary matters in diversity of citizenship cases.

II

THE SIXTH CIRCUIT COURT OF APPEALS DETERMINED BY ITS RULING THE EXISTENCE OF ONLY A SINGULAR BASIS FOR REVERSAL OF THE TRIAL COURT VERDICT AND JUDGMENT WITH REMAND FOR A NEW TRIAL.

The Defendant attempts to tilt the balance against granting this request for relief by dangling diversionary non-issues. It acknowledges that the Court of Appeals did not decide that any other issue was of sufficient import to warrant reversal. The Respondent attempts to reconcile this inaction with speculative plausibility.

Despite the Federal Rules of Evidence clearly being the standard to be used in determining issues of relevancy and admissibility, the Respondent being unable to identify precedent to the contrary, it still hopes to avoid a full review in this Court by suggesting the remote possibility that a different result is precluded for other reasons. If that diversion or ploy is to prevail, then the erroneous federal precedent of this case will subsist and haunt federal jurisprudence until this Court is offered another opportunity to settle the issue and rectify the abounding damage.

The non-issue of inadmissible hearsay, alluded to by the Respondent, was briefed and argued in the Court of Appeals. The Respondent failed to advise this Court that the testimony of Oempke, relating to Dr. Feuer's version of the accident, was specifically elicited by the Respondent. It put it into evidence on cross examination. It

happened at the de bene esse deposition of Oempke on August 27, 1985. The answer to their questions requesting hearsay obviously came back different than expected. At the September, 1985 trial, it objected to that testimony and moved to have it stricken. The court denied the motion. [TR Vol. I, pp. 70-84]

On appeal, it was demonstrated that the Respondent had asked questions calling for obvious hearsay. It was then pointed out that when a party asks a question calling for hearsay and the answer is responsive, the right to object is waived. 1 *Wigmore, Evidence*, 3rd Ed., 1940, Sec. 18, p. 344. Similarly, in *Rucker v. Wabash Railroad Co.*, 418 F2d 416; 453 n6 (C.A. 7, 1969), a hearsay objection was disallowed. The evidence was not permitted to be challenged on appeal because the attorney's cross examination sought the hearsay response. The hearsay objection was deemed to be waived! Hence, in this case there is no holding by the Court of Appeals that there should be a reversal of the verdict and judgment, with remand to the trial court, on the basis of inadmissible hearsay.

It is clear that the Respondent wants a retrial, and wants it without any testimony on the prior accident. It wants that result, even though it is clear that the trial court found that both accidents were "sufficiently similar" to be relevant and have probative value to show notice of an unsafe or dangerous condition. Sensing some advantage gained by the erroneous appellate ruling, if it can get this Court to refuse to take jurisdiction, it will attempt to exclude Dr. Feuer's testimony as irrelevant and therefore inadmissible under the "law of the case" doctrine.

This position has already been espoused by Respondent in response to Petitioner's Motion for Leave to Take Deposition During Pendency of Appeal. The Petitioner seeks to avoid the further compounding of injustice along the exasperating course of litigation to obtain compensation for permanent and debilitating injury sustained at the hands of this financially disparate opponent. This can

be ameliorated by the Supreme Court taking jurisdiction and granting the Petition for Writ of Certiorari.

CONCLUSION

The legacy of the case at bar, as it presently stands, is misdirection, confusion, and unnecessary future litigation on what should otherwise be an uncomplicated and well-established concept of federal jurisprudence. This case presents the United States Supreme Court with the opportunity to create precedent and remove from conflict and doubt an important concept of federal diversity jurisprudence. Therefore, the United States Supreme Court is urged to become involved and to exercise its power of supervision to definitively rule on this important question of federal jurisprudence.

Respectfully submitted,

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